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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BANK OF COUSHATTA, *et al.*,
Petitioners,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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ARGUMENT

1. The Brief for the Respondent in Opposition ("Resp. Br.") abandons arguments made to the court of appeals or makes new arguments inconsistent with the basis upon which the court of appeals decided the case.

a. The Government for the first time argues that the district court's *ex parte* order was only a show cause order. Resp. Br. at 15-16, n. 11. But the FDIC said in its brief below that the court of appeals "ha[d] jurisdiction of this case pursuant to 28 U.S.C. § 1291 because the appellant . . . filed a timely appeal from a final judgment of the district court." Brief for FDIC at 12, *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991)

(No. 90-4577). The Government's new position also directly contradicts the FDIC's position, adopted by the district court, that the proceeding in district court was purely ministerial. *See* Pet. App. 26a.

Nothing in the district court's *ex parte* order (Pet. App. 21a-22a) or its ruling denying a stay pending appeal (Pet. App. 23a-29a) indicates that the district court considered its order anything less than a final and appealable order. Moreover, in view of the seriousness with which the FDIC litigates deadlines for appeal,[1] the petitioners had no choice but to appeal. The FDIC did not raise the issue of finality in opposing a stay in the district court, in opposing a stay in the court of appeals, or in its brief on the merits in the court of appeals. Nor did the court of appeals address the issue. Moreover, the Government does not list this issue of finality as a Question Presented. Resp. Br. I. Thus, at this stage the *ex parte* order must be considered final and appealable.[2]

b. Again changing positions, the Government argues in the space of one paragraph that the word "apply" in

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[1] *E.g., Amberg v. FDIC*, 934 F.2d 681 (5th Cir. 1991); *Kronholm v. FDIC*, 915 F.2d 1171 (8th Cir. 1990).

[2] If the Government's new characterization of the district court's order is accepted, the Government will no doubt argue that this Court should vacate the judgment of the court of appeals and remand the cause to that court with instructions to dismiss the appeal. *E.g., Di Bella v. United States*, 369 U.S. 121 (1962). Such a remand, however, should include instructions to the district court to conduct any further proceedings in accordance with the Federal Rules of Civil Procedure. See part 1.b. of this brief.

Such instructions would also be consistent with the intent of Congress that the right to a trial, either before the agency or in court, be preserved. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 45-46 (1946) (analyzing section 10 of the original version of the Administrative Procedure Act); *see also* 5 U.S.C. § 554(a)(1); *United States v. First City National Bank of Houston*, 386 U.S. 361, 368 (1967). Any instructions upon remand should also require consideration of this Court's recent decision in *Touby v. United States*, 111 S. Ct. 1752 (1991).

12 U.S.C. § 1818(i) makes the Federal Rules of Civil Procedure inapplicable to this case and that Rule 61 of those same rules makes the failure to comply with them insignificant. Neither argument was made below. The Government fails to acknowledge that the word "apply" in 12 U.S.C. § 1818(c)(2) and (f) is not generally believed to exempt the FDIC's adversaries from compliance with the Federal Rules of Civil Procedure when they "apply" for relief. *E.g.*, [*Anonymous*] *v. FDIC*, 617 F. Supp. 509 (D.D.C. 1985), *after remand*, 619 F. Supp. 866 (D.D.C. 1985) (application for stay initiated by the filing of a civil action). Moreover, although the statute in *United States v. Powell*, 379 U.S. 48 (1964), also used the word "apply" in authorizing the Internal Revenue Service to seek judicial enforcement of subpoenas, this Court held that because the statute contained no procedure to be followed in invoking the district court's jurisdiction the Federal Rules of Civil Procedure applied. 379 U.S. at 58 n.18. This Court also noted in *Powell* that the power of the IRS to enforce a subpoena "does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered." *Id.* at 58; *see also New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

c. In the court of appeals the FDIC argued that the capital directive was unreviewable because there was nothing upon which a trial court could exercise its fact-finding powers:

> All that is even arguably left for review is the *arithmetic* by which the agency establishes the current level [of capital] . . . .

Brief for FDIC at 23, *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991) (No. 90-4577) (emphasis added). Now, in another complete about face, the Government bases its argument on "the complex and technical financial determinations the FDIC makes under ILSA" (Resp. Br. at 8), the "painstaking examination of the

bank's books and discussions with bank officials" (*id.* at 9, n. 5), and the "technical banking determinations implicating industry expertise as well as economic judgment" (*id.* at 10). The materials filed by the FDIC with the district court do not include any "complex financial determinations," any report of examination, or any information about the "discussions with bank officials." Thus, the Government has taken it upon itself to determine what facts are before the courts, apparently free to change its characterization of those facts to suit its changes in legal arguments. No matter how strong the Government's assertions as to the facts, they are only its assertions. The district court made no factual findings. *See* Pet. App. 21a-22a. The court of appeals' discussion was based upon the FDIC's pleadings in the district court, to which the petitioners had no opportunity to respond.

d. The Government now goes beyond the court of appeals in relying upon the withdrawal provision 12 U.S.C. § 1818(i). Although acknowledging that the court of appeals did not rest its analysis upon the withdrawal provision, the Government now flatly states, "Section 1818(i) functions as a complete jurisdictional bar to judicial review" of capital directives. Resp. Br. at 12, n.8. Although this statement is immediately contradicted by the statement that "a bank that receives a capital directive may raise due process or other constitutional claims in the context of an enforcement proceeding" (Resp. Br. at 14), the Government later says that "the district court, when enforcing a capital directive, is required to treat the capital directive as final and unreviewable order." *Id.* at 15, n. 10. The foregoing statements illustrate the need for this Court to grant certiorari and determine the role of district courts in the enforcement of capital directives.

e. The Government has also changed its position on the jurisdiction of Article III courts to review administrative orders in judicial enforcement proceedings. In his brief in *Touby v. United States*, 111 S. Ct. 1752 (1991) (No.

90-6282), at 35 n. 32, the Solicitor General noted that reviewability does not depend upon a specific statutory provision but is generally available in the defense of enforcement proceedings:

> The APA also incorporates that general rule, providing that "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement," 5 U.S.C. 703. That provision simply "restates existing law." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 99 (1947). See also *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 115 (1941).

Indeed, we are aware of no case prior to this in which the Solicitor General has argued that an Executive Branch agency can invoke the jurisdiction of an Article III court to enforce agency action without submitting the action to review. Thus, the Government's argument in this case would, if accepted, result in a novel constitutional doctrine.

2. The Government's argument that capital directives are rarely used (Resp. Br. at 13, n. 8) is no longer true. *See Carteret Savings Bank v. Office of Thrift Supervision*, 762 F. Supp. 1159 (D. N.J. 1991), *appeal docketed*, No. 91-5290 (3d Cir. filed March 25, 1991); *Transohio Savings Bank v. Director, Office of Thrift Supervision, appeal docketed*, No. 91-5246 (D.C. Cir. August 8, 1991).

It is particularly noteworthy that although the Solicitor General is on the briefs in the *Carteret* case, and although the Solicitor General has indicated that he will personally make the Government's argument in the Third Circuit in that case, neither of his briefs in *Carteret* (the most recent of which was filed on August 5, 1991) disputes the reviewability of capital directives. This underscores our point that the notion that an administrative agency can

impose an administrative sanction without judicial review is a novel proposition even within the Executive Branch. "If so obviously useful an instrument was available to the agencies, one would expect that [this Court] would previously have had occasion to review its exercise." *Brown v. Georgetown University Hospital*, 488 U.S. 204, 222 (1988) (Scalia, J., concurring) (rulemaking).[3]

3. The Government is wide of the mark when it attempts to avoid review of issues involving the right to a hearing under the Administrative Procedure Act and the question of the FDIC's authority over the individual petitioners. See Resp. Br. at 16 n.12. The Government does not dispute that the Questions Presented were before the court of appeals. Indeed, both of the cases the Government cites in support of its argument on these points were discussed by the Petitioners in their Reply Brief to the court of appeals.

The Government's argument that the APA hearing issue is not properly before this Court is simply wrong. It is true that the court of appeals, like the Government, did not cite *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), but it alluded to the issue. *See* Pet. App. 18a. Moreover, the issue is discussed in the Petition. *See* Pet. 7. It also seems apparent that the court of appeals believed that its decision on the issue of reviewability subsumed the APA hearing issue. *See Webster v. Doe*, 486 U.S. 592, 599 (1988) (5 U.S.C. § 701(a) limits application of the entire APA). Finally, the court of appeals

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[3] Because there has to be a first time for everything, the fact that the FDIC apparently never before used its capital directive authority does not, by itself, show that the agency was arbitrary and capricious in this instance. However, it does beg some rational explanation why after nearly a decade, the FDIC chose Bank of Coushatta as its first target. And although it is true that the Bank did not argue that the FDIC had failed to follow its own procedures, it is also true that the petitioners have not yet had the benefit of discovery in this case and that they have not yet pleaded in the district court.

discussed the issue of the FDIC's authority over individuals, and so did the petitioners. *See* Pet. 8, 13-14, 8a-9a.

4. The Government's reliance upon the Senate committee report on ILSA rather than the House Banking Committee Chairman's explanation to his colleagues is also inconsistent with prior views of the Department of Justice itself. *See generally* U.S. Dep't of Justice Office of Legal Policy Report to the Attorney General, *Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation* 15 (1989):

> To begin with, a committee report is typically prepared by staff after the committee votes to report the bill out, and there is no formal approval by the committee. Even if the committee formally voted on the text of the report, the report would represent the committee members' intent in the same way that the enacted bill represented the intent of the entire legislature. Thus, under the agency approach, if one had to look to the intent of the committee rather than the statute to ascertain the intent of the legislature, perhaps one would have to look to the intent of the appropriate subcommittee rather than the committee report to ascertain the true intent of the committee.

See also Starr, *Observations About the Use of Legislative History*, 1987 Duke L. Rev. 371, 375.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and summarily reverse the judgment of the court of appeals.

Respectfully submitted,

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